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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 708

5 CASES, MORE OR LESS, ETC.; ANTONIO CORRAO CORPORATION, CLAIMANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the district court on the petitioner's motion for discovery (R. 189-192) is reported at 9 F. R. D. 81. The opinion (R. 247-253) of the Court of Appeals is reported at 179 F. 2d 519.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1950 (R. 254). The petition for a writ of certiorari was filed on March 28,

1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error when it applied its order excluding witnesses from the courtroom, entered at the request of petitioner's counsel, to the corporate petitioner's president who had been subpoenaed as a Government witness.

2. Whether, in the circumstances of this case, the trial court committed reversible error in denying the request of petitioner's counsel that he be permitted to make an opening statement.

3. Whether the trial court committed reversible error in denying petitioner's motions for mistrial, arising out of the Government's calling a witness who claimed his privilege against self-incrimination and the prosecutor's comment, in summation, on that claim.

4. Whether the trial court committed reversible error in denying petitioner's pre-trial motion for discovery and inspection of the Government's chemical tests, analyses, and reports.

5. Whether the charges of adulteration and misbranding and the representative nature of the samples relied upon were sustained by competent evidence sufficient to justify submission of these factual issues to the jury.

6. Whether the Court of Appeals erred in denying petitioner's motion to remand the case to the district court for a new trial.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*, provides in pertinent part:

> SEC. 304 (a). Any article of food * * * that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned * * *. [21 U.S.C. 334 (a)]
>
> SEC. 304 (c). The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruits or fresh vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the package from which the samples analyzed were obtained. [21 U.S.C. 334 (c)]
>
> SEC. 304 (d). Any food * * * condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct * * *. [21 U.S.C. 334 (d)]
>
> SEC. 402. A food shall be deemed to be adulterated—* * * (b) (1) If any valuable con-

stituent has been in whole or in part omitted or abstracted therefrom; or * * * (4) if any substance has been added thereto or mixed or packed therewith so as to * * * make it appear better or of greater value than it is. [21 U.S.C. 342 (b)]

SEC. 403. A food shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular. [21 U.S.C. 343 (a)]

SEC. 702 (b). Where a sample of a food * * * is collected for analysis under this Act the Administrator shall, upon request, provide a part of such official sample for examination or analysis by any person named on the label of the article, or the owner thereof, or his attorney or agent; * * *. [21 U.S.C. 372 (b)]

STATEMENT

This case arises out of libel proceedings instituted by the United States under Section 304(a) of the Federal Food, Drug, and Cosmetic Act in the District Court for the District of Connecticut for the seizure and condemnation of five shipments of two brands of blended edible oil. One of the products, designated as Pace O Mio Dio Brand, purported to be 80 percent peanut oil and 20 percent pure olive oil. The other, designated as Figlia Mia Brand, purported to contain 90 percent vegetable oils and 10 percent pure olive oil. The libels of information alleged that the oils were adulterated within the meaning of Section

402(b)(1) of the Act in that a valuable constituent, olive oil, had been wholly or in part omitted therefrom, and within the meaning of Section 402(b)(4) in that artificial flavoring and squalene had been added thereto in order to make the oils appear to be or to contain substantial amounts of olive oil, which is better and of greater value than the oils contained in the products. The libels also charged that the oils were misbranded within the meaning of Section 403(a) in that the label statements, "20% pure olive oil" and "10% pure olive oil", were false and misleading as applied to products containing little, if any, olive oil. (R. 3-8.) Antonio Corrao Corporation appeared in the proceedings as claimant and filed an answer substantially in the form of a general denial (R. 9-15). The five actions were consolidated for trial (R. 19-20).

Expert testimony adduced by the Government showed that the squalene content of blended edible oils is universally used as a measure of the amount of olive oil present in a blend (R. 36, 37, 113-115, 142). Squalene is also present in shark liver oil. It is impossible to distinguish one squalene from the other. (R. 39, 40, 115, 153.) By adding shark liver oil squalene to peanut oil or to vegetable oil, it is possible to produce blends that appear in standard chemical tests to contain 10 percent or 20 percent olive oil, although actually they contain none or as little as 1 or 2 percent.

Learning that squalene was being added to blended oils to confound the chemical test for determining olive oil content, the Government devised a method for detecting added squalene (R. 124, 125, 212, 213).

The only possible commercial source of squalene obtained from shark liver oil was Distillation Products, Inc., of Rochester, New York (R. 209, 210). Agents of the Federal Food and Drug Administration went to this only known source and mixed a small amount of anthranilic acid, a chemical marker completely foreign to any edible oil or to squalene, into the last batch of squalene produced (R. 59, 106-107, 116, 211, 244). The chemically marked squalene was traced step by step from the time it left Distillation Products, Inc., until it reached one Louis Memmoli in Brooklyn, New York (R. 72-78, 80-83, 85-87, 93-95). On being questioned by inspectors Williams and Russell of the Food and Drug Administration at petitioner's plant on June 8 and 9, 1948, Corrao, petitioner's president and manager, first denied knowing Memmoli. Subsequently, however, he permitted the inspectors to examine his personal telephone and address book in which Memmoli's name, business address, and home and business telephone numbers were found. Confronted with this evidence, Corrao then admitted that he knew Memmoli, explaining that he had been misled by the agents' pronounciation of the name. (R. 235, 236, 239.) And at the trial, Corrao

admitted that he knew Memmoli well (R. 232).

During the inspection of petitioner's plant above referred to, the Food and Drug Administration inspectors found two 5,000 gallon mixing tanks containing a total of 8,600 gallons of oil in operation (R. 230-231). Shortly thereafter, interstate shipments of petitioner's oil were made, and Food and Drug inspectors selected sample cans from the shipments at random (R. 168).[1] Analysis of these samples revealed the presence of "marked" squalene in petitioner's oils (R. 55-60, 97-106).

The consolidated cases were tried before a jury, which returned a special verdict finding that the charges of adulteration and misbranding were true (R. 26-29). The District Court thereupon entered judgment condemning the five shipments (R. 19-21). The judgment was affirmed by the Court of Appeals for the Second Circuit (R. 254).

Thereafter, petitioner filed a motion in the Court of Appeals for an order staying the mandate and reversing the judgment of the District Court and/or remanding the case for a new trial (R. 255-264). The motion was denied (R. 264-265).

ARGUMENT

1. Petitioner's first complaint is that Corrao, its president, was excluded from the courtroom (Pet.

[1] The record before this Court, consisting of appendices prepared by each party, is somewhat abbreviated. But the fact of shipment, as found by the jury (R. 26) is not disputed, nor is it disputed that the selections were made at random.

13-16). But that situation was of petitioner's own making. The record reveals that a motion to exclude all witnesses was made and pressed by petitioner's counsel (R. 32). Over the Government's objection (R. 32), the district court granted petitioner's motion and directed that witnesses be excluded until they testified (R. 33). Government counsel then noted Corrao's presence in the courtroom despite the fact that he was "being subpoenaed as a witness by the Government", and the the court ruled that since the exclusion order must be "applied equally to all witnesses" (R. 67) Corrao fell within it (R. 33-35).

In so ruling, the district court did not commit reversible error. As the Court of Appeals pointed out (R. 250), the universal rule in the federal courts is that the sequestration of witnesses lies within the discretion of the trial judge. There was no abuse of that discretion. "It is apparent that the danger of an attempt to falsify testimony and the utility of sequestration to expose it are most emphatic for *a party* who is a prospective witness." 6 Wigmore, *Evidence* (3d ed.), p. 364 (italics supplied). And the countervailing considerations against exclusion in the case of a party have less force here since Corrao was not a party; the corporation was. *Kentucky Union Lumber Co.'s Assignee, &c.* v. *Abney,* 17 Ky. L. Rep. 401 (chief officer of corporate party properly excluded). This circumstance, taken in connection with the district

court's ruling that there is "no objection to your defendant having any advisers in court that are desired, so long as they are not also witnesses" (R. 50) brings Corrao's exclusion within the area of the trial court's permissible discretion.

District of Columbia v. *Flagg*, 42 App. D. C. 73, 76, the only federal court decision relied upon by petitioner (Pet. 14), is not to the contrary. The *holding* of the court in that case was that it was error to disqualify a witness who had disobeyed the trial court's order of exclusion. The question of disqualification, of course, is a problem distinct from that at bar.

2. It was also within the trial judge's discretion to deny petitioner's counsel's request that he be permitted to make an opening statement after Government counsel had waived such a statement (R. 30-31; see Pet. 16-17). While there are statutes in some states which expressly provide a right to make an opening statement, there is no such rule in the federal courts, and it is universally recognized that all matters touching the orderly conduct of the trial are within the sound discretion of the trial court. The same measure of discretion should be allowed as to the need for opening statements. As the Court of Appeals observed (R. 250), the issues to be tried were simple and had been explained by the trial judge on the voir dire examination of the jurors (R. 245-246). An opening statement by counsel would have been merely a restatement of

matter already covered by the court. Counsel at no time made any attempt to show the necessity for an explanatory statement even though, under the trial court's ruling, he was free to do so. For, with respect to the question of an opening statement, the trial court said (R. 31-32): "I think I would prefer, Mr. Zizmor, to feel our way, and if we get into areas in which the drift of the evidence is not apparent, we can then explain it as we go along." And petitioner's counsel was, of course, accorded the fullest opportunity to explain his theory of the case in his closing argument to the jury.

3. The district court did not commit reversible error in denying petitioner's motions for mistrial arising out of the witness Memmoli's claim of privilege (cf. Pet. 17-20). After it had been established by other witnesses that a quantity of squalene had been ordered by Memmoli and delivered to him (R. 72-74, 75-78, 81, 83), Memmoli was called as a witness by the Government (R. 88). He immediately stated that he refused to testify on the ground that his testimony might incriminate him, particularly in connection with a certain criminal case then pending against him in the United States District Court for the Eastern District of New York. The court advised him that the pending question as to his occupation was not incriminating, but that the court would keep his statement in mind. (R. 88-89.) Thereafter, the court sustained Memmoli's claim of privilege in refusing to answer a series of specific

questions, not objected to by petitioner, concerning his acquaintance and dealings, if any, with Corrao and Distillation Products, Inc. (R. 89-92). Only after the Government had completed its examination (R. 92) did petitioner move for a mistrial upon the ground that "the propounded questions and refusal of the witness to answer are prejudicial to the rights of my client." R. 92). Petitioner's present assertion that it was reversible error to call Memmoli as a witness and interrogate him because the Government knew that he was under indictment and would claim his privilege (Pet. 17-20) is based entirely upon allegations to that effect in its motion, filed in the Court of Appeals after entry of the judgment of affirmance, to remand the cause for a new trial (R. 261-262). (See *infra,* pp. 14-15.

There is nothing in the record of the proceedings in the trial court to indicate that the United States attorney acted in bad faith in calling Memmoli to the witness stand. See *infra,* pp. 14-15. Furthermore, after Memmoli claimed his privilege, petitioner was aware that he would not answer further questions. Nevertheless, it made no objection or protest of any kind to several pointed questions which were asked of the witness and which the witness refused to answer. Not until after the Government had completed its examination and the alleged prejudice which petitioner complains of had been accomplished was there any objection (R. 92). The Court of Appeals was therefore right in hold-

ing that there was no error in denying the motion for a mistrial, for as the court stated (R. 253): "The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by his silence he has helped to create." If, as is indicated in the motion filed in the Court of Appeals (R. 261) and the petition for certiorari (p. 18), petitioner had prior knowledge of Memmoli's intended refusal to testify, it was incumbent upon petitioner to object to the interrogation on that ground.

Petitioner's further complaint (Pet. 19-20) against Government counsel's reference, in his argument to the jury, to Memmoli's refusal to answer questions (R. 163) is without merit. It is, of course, evident that the jurors were well aware of the fact that Memmoli had refused to testify. Nevertheless, the trial court specifically instructed the jury that Memmoli's refusal did not constitute ground for any unfavorable inference against petitioner, and that "the situation, then, is just as though Memmoli had never been called" (R. 171). Even in a criminal case, comment by the prosecutor upon the defendant's refusal to testify is cured by an appropriate instruction. *United States* v. *De Vasto,* 52 F. 2d 26 (C.A. 2), certiorari denied, 284 U. S. 678; *Morris* v. *United States,* 61 F. 2d 520 (C.A. D.C.), certiorari denied, 287 U.S. 597; *United States* v. *Di Carlo,* 64 F. 2d 15 (C.A. 2). Certainly, a similar instruction should cure such

error as may possibly arise from a comment on the refusal of a witness in a civil case against a corporation.

4. Little need be added to the opinion of the district court (R. 189-192) and that of the Court of Appeals (R. 251-252), rejecting petitioner's claim that it was entitled to pre-trial discovery of copies of Government tests, analyses, and chemical reports (Pet. 25-27). Before trial, petitioner had made its own tests and asserted, as the only ground for discovery, its fear that it might be "entrapped" at trial (R. 25). That is not such a showing of "good cause" as is required by Rule 34 of the Rules of Civil Procedure. Although petitioner now insists that its fears were realized (Pet. 26), the alleged "entrapment" never concerned petitioner sufficiently to induce him even to seek a continuance to enable him to meet the "new" evidence (R. 252). A need not felt at trial certainly does not constitute good cause before trial. In any event, petitioner is completely unable to show that the error, if any, in denying pre-trial discovery was not, or could not have been, cured at trial if petitioner had been as conscious of prejudice then as it seems now to be, and had taken appropriate steps to protect itself against the injury which, as an afterthought, it now asserts.

5. The competency and sufficiency of the evidence, on the issues of adulteration, misbranding,

and the representative character of the samples, are questions obviously peculiar to this case and wholly inappropriate bases for certiorari. The Statement, *supra,* pp. 4-7, reveals that the evidence was more than sufficient to go to the jury, and the jury was correctly instructed that the Government had the burden of proof on these issues (R. 165).

6. After the court below had affirmed the decree of the district court (R. 254), petitioner moved it to remand the cause for a new trial (R. 255-263). Petitioner sought such disposition on two grounds: it asserted (a) that government counsel had known in advance that Memmoli would refuse to answer any questions (see *supra,* pp. 10-12), and (b) that expert government witnesses had contradicted themselves in crucial respects at a subsequent trial in another district of petitioner and its president on criminal charges.[2]

(a) The assertion that the Government was forewarned of Memmoli's claim of privilege was made only after the Court of Appeals had indicated, in its opinion, that it had grave doubts as to the propriety of calling a witness whom a party knows will claim his privilege, and after the court had dismissed those doubts in this case with the observation that there was no showing that Government counsel "knew or had reasonable cause to know that

[2] We are advised that both defendants were found guilty.

Memmoli would claim the privilege when he took the stand" (R. 252-253). The record of the proceedings in the trial court does not show any discussion at side bar as was alleged in the motion (R. 261; see also Pet. 18) or that the judge was aware of the pending indictment against Memmoli and the possibility of an objection to calling him as a witness.

In these circumstances, an appellate court may not properly be called upon to withdraw a previously entered decree because of matter not brought to the attention of the trial court. Rule 60 (b) of the Federal Rules of Civil Procedure provides ample means for reopening a judgment and there is no justification for ignoring its provisions, under which claims such as are made by petitioner can be tried out in an orderly fashion. A Court of Appeals cannot ordinarily conduct a *de novo* hearing to ascertain the truth of allegations such as were made by petitioner, and it would have been highly improper for the Court of Appeals to order a new trial on *ex parte* representations.

(b) What has just been said disposes also of petitioner's complaint, made after judgment in the Court of Appeals, that contradictory testimony by expert witnesses for the Government in the criminal case indicated that, in this case, they had failed to disclose pertinent facts (R. 257-261). On the face of petitioner's charge, moreover, its real grievance seems to be that the witnesses in question were sub-

jected to less searching cross-examination by petitioner in this case than in the criminal case. In fact, so far as this record discloses, there is no lack of substantial consistency between the testimony of Fitelson [3] in this case and the alleged excerpts from his testimony at the criminal trial which are quoted in the motion filed in the Court of Appeals (compare R. 37, 114-119, 142-143, 206-213 with R. 257-259 and Pet. 23-24).

CONCLUSION

The decision of the court below is correct and there is no conflict. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1950.

[3] He is singled out here only because it is his testimony of which the petitioner complains in this Court (Pet. 23-24).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 [illegible]